STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

RICHARD HOOD, Charging Party, v. FILLMORE UNIFIED TEACHERS ASSOCIATION, Respondent.	Case No. LA-CO-1499-E PERB Decision No. 2274 June 22, 2012

Appearances: Richard Hood, on his own behalf; California Teachers Association by Brenda E. Sutton-Wills, Attorney, for Fillmore Unified Teachers Association.

Before Martinez, Chair; Dowdin Calvillo and Huguenin, Members.

DECISION

DOWDIN CALVILLO, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Richard Hood (Hood) of the PERB Office of the General Counsel's dismissal (attached) of his unfair practice charge. The charge, as amended, alleged that the Fillmore Unified Teachers Association (Association) violated section 3543(a) of the Educational Employment Relations Act (EERA)[1] by denying him an equal right to participate in a contract ratification vote. The Board agent found that most of the allegations were untimely and that the charge failed to state a prima facie case of interference with protected employee rights or violation of the duty of fair representation.

The Board has reviewed the dismissal and the record in light of Hood's appeal and the relevant law. Based on this review, we find the dismissal and warning letters to be

[1] EERA is codified at Government Code section 3540 et seq.

well-reasoned, adequately supported by the record, and in accordance with applicable law. Accordingly, the Board adopts the dismissal and warning letters as the decision of the Board itself, supplemented by the discussion below.

DISCUSSION

Arguments on Appeal

In his appeal, Hood appears to be attempting to address the Board agent's determination that the charge failed to allege facts showing that the Association's actions had a "substantial impact" on his relationship with his employer, the Fillmore Unified School District (District), in that the changes to the contract with respect to employee transfer and seniority rights "so severely altered the relationship of teachers to the District, that created the conditions which gave the District cover to treat me unfairly." We find that this issue was adequately addressed by the Board agent and requires no further discussion here. (*California School Employees Association and its Chapter 107 (Chacon)* (1995) PERB Decision No. 1108; *Los Rios College Federation of Teachers, CFT/AFT (Violett, et al.)* (1991) PERB Decision No. 889 [the duty of fair representation does not mean that an employee organization is barred from making an agreement that may have an unfavorable effect on some members or that benefits some members more than others.].)

New Evidence and Allegations on Appeal

In his appeal, Hood presents new factual allegations and evidence that were not presented in the original charge or the amended charge. "Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence." (PERB Reg. 32635(b);[2] see also *CSU Employees Union, SEIU Local 2579 (Kyrias)* (2011) PERB Decision No. 2175-H.) The Board has found good cause when "the information provided could

[2] PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

not have been obtained through reasonable diligence prior to the Board agent's dismissal of the charge." (*Sacramento City Teachers Association (Ferreira)* (2002) PERB Decision No. 1503.)

On December 22, 2011, the Board agent issued a letter advising Hood that the charge failed to state a prima facie case and warning him that the charge would be dismissed unless he amended the charge to state a prima facie case. Hood filed an amended charge on January 12, 2012. On April 13, 2012, the Board agent dismissed the charge. Hood filed an appeal from the dismissal on May 10, 2012. The appeal includes new factual allegations and evidence provided for the first time on appeal that all predate the dismissal letter. Specifically, the appeal includes excerpts from a contract covering the period 2010 – 2013 that Hood asserts "existed before the vote in question in May, 2011." In addition, the appeal includes a letter dated April 29, 2011 with attached tentative agreements dated March 9, March 25, April 13, and April 27, 2011. Hood asserts that these documents demonstrate that the Association's actions had a "substantial impact" on his employment relationship with the District in that they resulted in unfavorable changes to his transfer and seniority rights. The appeal provides no reason why these documents and factual allegations could not have been included in the original charge or in the amended charge. Thus, we do not find good cause to consider these new allegations. Moreover, for the reasons stated above, even if we were to consider them, they would not alter our conclusion that the charge fails to state a prima facie violation of the duty of fair representation.

ORDER

The unfair practice charge in Case No. LA-CO-1499-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Martinez and Member Huguenin joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
700 N. Central Ave., Suite 200
Glendale, CA 91203-3219
Telephone: (818) 551-2809
Fax: (818) 551-2820

April 13, 2012

Richard Hood

Re: *Richard Hood v. Fillmore Unified Teachers Association*
Unfair Practice Charge No. LA-CO-1499-E
DISMISSAL LETTER

Dear Mr. Hood:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on November 9, 2011. Richard Hood (Charging Party) alleges that the Fillmore Unified Teachers Association (Association) violated section 3543(a) of the Educational Employment Relations Act (EERA or Act)[1] by denying him an equal right to participate in a contract ratification vote.

Charging Party was informed in the attached Warning Letter dated December 22, 2011, that the charge did not state a prima facie case. Charging Party was also advised that it was assumed that the Charging Party also meant to allege a violation of EERA section 3543.6, subdivision (b), that the Association interfered with Charging Party's exercise of rights guaranteed by the Act. The Warning Letter also reviewed Charging Party's allegations to determine whether they stated a prima facie violation of Charging Party's right to fair representation. The Warning Letter set forth the law relevant to interference and the duty of fair representation and concluded the allegations failed to demonstrate unlawful interference or a failure to meet the duty of fair representation.

Charging Party was advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, Charging Party should amend the charge. Charging Party was further advised that, unless Charging Party amended these allegations to state a prima facie case or withdrew them prior to January 6, 2012, the charge would be dismissed. Charging Party requested and obtained an extension of time to amend the charge and on January 12, 2012, Charging Party filed his First Amended Charge.

I. Additional Allegations in First Amended Charge

Prior to March 15, 2011, the Fillmore Unified School District (District) issued 46 RIF notices. Eighteen of the RIFs were for elementary teachers.

[1] EERA is codified at Government Code section 3540 et seq. The text of the may be found at www.perb.ca.gov.

On March 25, 2011 the District and the Association signed a tentative agreement that included five furlough days for the next school year.

On April 29, 2011, the District sent out a bargaining update notifying members that the District was planning to rescind the majority of the elementary RIFs on May 3, 2011.

On May 4 and 5, 2011, the Association conducted a ratification vote on the tentative contract at all the campuses. The Association required members to vote at central locations at the Middle School, High School and Continuation School during limited times of the day.

On May 6 and 9, 2011, the Association allowed members at Mountain Vista School, one of the four elementary schools in the District, to "have until Monday [, May 9, 2011,] 2:30 to vote." (5/4/2011 e-mail message from Jennifer Fitzpatrick to Mountain Vista Staff, attached to First Amended Charge.) The e-mail message explained the Mountain Vista staff would have until May 9, 2011, because members at Mountain Vista did not receive the ratification packet on Friday, April 29, 2011 like bargaining unit members at other work sites.

On November 7, 2011, Charging Party learned from a bargaining unit member that at two of the four elementary school sites, Association Representatives brought ballot boxes, ballots and election sign-in sheets to teachers' classrooms during preparation time and urged them to vote and cast their ballot immediately.[2]

As a result of the vote and subsequent contract, Charging Party was given two classes he had not previously taught and Charging Party was not afforded the right to transfer. Charging Party suffered additional stress that lead him to retire early for health reasons, which adversely affects Charging Party's income and benefits for his family, and lessens his retirement income for life.

Charging Party complains he was excluded from voting because he was a religious objector and complains the Association conducted the election in a way that favored participation of elementary school employees who have less seniority, were scared of losing their jobs, and were more likely to vote to ratify the tentative agreement.

II. Discussion

Timeliness

EERA section 3541.5(a)(1) prohibits PERB from issuing a complaint with respect to "any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." The limitations period begins to run once the charging party knows, or should

[2] On April 13, 2012, Charging Party advised this Board Agent during a telephone conversation that Charging Party could provide more evidence that the Respondent selectively took ballot boxes to individual members to skew participation.

have known, of the conduct underlying the charge. (*Gavilan Joint Community College District* (1996) PERB Decision No. 1177.) A charging party bears the burden of demonstrating that the charge is timely filed. (*Tehachapi Unified School District* (1993) PERB Decision No. 1024; *State of California (Department of Insurance)* (1997) PERB Decision No. 1197-S.) Charging Party alleges that he learned of Respondent's conduct on November 7, 2011. Assuming, *arguendo,* the unfair practice charge is not time barred, the charge still fails to state a prima facie violation of EERA as explained herein below.

Duty of Fair Representation

It is well-established that PERB does not have jurisdiction over matters concerning internal union affairs unless they have a substantial impact on the relationship of bargaining unit employees to their employer so as to give rise to a duty of fair representation. (*Service Employees International Union, Local 99 (Kimmett)* (1979) PERB Decision No. 106; *California State Employees Association (Hutchinson, et al.)* (1998) PERB Decision No. 1304-S.) In *California State Employees Association (Hutchinson)* (1999) PERB Decision No. 1369-S, the Board dismissed allegations that the union conducted elections outside the timeframe required by union bylaws; and mailed election ballots, improperly validated ballots, failed to properly distribute election results, and improperly installed union officers in violation of union bylaws. In *California State Employees Association (Hackett)* (1993) PERB Decision No. 1012-S, the Board found no substantial impact on the employee-employer relationship where the union suspended the bargaining team; submitted a proposal to the membership for ratification that was not approved by the bargaining team; failed to provide a secret ballot; and failed to give the membership any choice on the ballot except to vote for ratification or strike.

Further, as a general rule, an exclusive representative enjoys a wide range of bargaining latitude. As the United States Supreme Court explained in *Ford Motor Co. v. Huffman* (1953) 345 U.S. 330:

> Any authority to negotiate derives its principal strength from a delegation to the negotiators of discretion to make such concessions and accept such advantages as, in the light of all relevant considerations, they believe will best serve the interests of the parties represented. ... Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

Acknowledging the need for such discretion, PERB determined that an exclusive representative is not expected or required to satisfy all members of the unit it represents. (*California School Employees Association and its Chapter 107 (Chacon)* (1995) PERB

Decision No. 1108.) Moreover, the duty of fair representation does not mean an employee organization is barred from making an agreement which may have an unfavorable effect on some members, nor is an employee organization obligated to bargain a particular item benefiting certain unit members. (*Ibid.*; *Los Rios College Federation of Teachers, CFT/AFT (Violett, et al.)* (1991) PERB Decision No. 889.) The mere fact that some employees are not satisfied with the agreement is insufficient to demonstrate a prima facie violation. (*Los Rios College Federation of Teachers, CFT/AFT (Violett, et al.)*, *supra*.)

In contrast, a union violates its duty to fairly represent its members if its conduct in representing bargaining unit employees in contract negotiations is arbitrary, without a rational basis or devoid of honest judgment. (*Rocklin Teachers Professional Association (Romero)* (1980) PERB Decision No. 124.) The duty of fair representation concerning contract negotiations requires an exclusive representative to provide "some consideration of the views of various groups of employees and some access for communication of those views." (*El Centro Elementary Teachers Association (Willis and Willis)* (1982) PERB Decision No. 232; *Kern High Faculty Association, CTA/NEA (Maaskant)* (2006) PERB Decision No. 1834 ["union may exclude non-members from voting as long as the union provides them with an opportunity to communicate their views"].) The burden is on the charging party to show how an exclusive representative abused its discretion, and not on the exclusive representative to show how it properly exercised its discretion. *(United Teachers - Los Angeles (Wyler)* (1993) PERB Decision No. 970.)

Charging Party alleges he suffered many unfavorable effects as a result of the vote and subsequent contract. For example, Charging Party was given two classes he had not previously taught and was not afforded the right to transfer. Charging Party also suffered additional stress that lead him to retire early for health reasons, which adversely affects Charging Party's income and benefits for his family, and lessens his retirement income for life. The unfavorable effects, however, do not demonstrate the Association's election or the contract it agreed to with the District had a "substantial impact" on Charging Party's *employment relationship* with the District. Without allegations demonstrating substantial impact on the employee-employer relationship, PERB will not intervene in the Association's internal affairs. Similarly, the unfavorable effects, by themselves, do not demonstrate the Association breached its duty of fair representation. (*California School Employees Association and its Chapter 107 (Chacon)*, *supra*, PERB Decision No. 1108.) Charging Party did not meet his burden to provide facts demonstrating the Association's conduct was without a rational basis or devoid of honest judgment. (*United Teachers - Los Angeles (Wyler)*, *supra*, PERB Decision No. 970.) Finally, Charging Party's allegations do not allege the Association failed to provide opportunities for Charging Party to communicate his views to the Association. Without allegations demonstrating substantial impact on Charging Party's relationship with the District, allegations demonstrating the Association's conduct was without a rational basis or was devoid of honest judgment, or allegations demonstrating Charging Party was denied opportunity to communicate his views to the Association, the allegations fail to establish a prima facie case that the Association breached its duty of fair representation.

Interference

The December 22, 2011, Warning Letter explained the legal test for interference requires a showing that the right purportedly infringed by the employee organization must be one provided by EERA. A right provided by the employee organization itself, for example, the right to vote on contract ratification, is not provided by EERA. The allegations in Charging Party's First Amended Complaint fail to provide any further information that would demonstrate the right to vote on contract ratification is a right provided by EERA. Thus, Charging Party fails to establish a prima facie case that the Association unlawfully interfered with Charging Party's rights.

Conclusion

For the reasons set forth herein and in the December 22, 2011 Warning Letter, the Charge is hereby dismissed.

Right to Appeal

Pursuant to PERB Regulations,[3] Charging Party may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (PERB Regulation 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received during a regular PERB business day. (PERB Regulations 32135(a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (PERB Regulation 32135(b), (c) and (d); see also PERB Regulations 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

[3] PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

If Charging Party files a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five (5) copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (PERB Regulation 32635(b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See PERB Regulation 32140 for the required contents.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (PERB Regulation 32135(c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (PERB Regulation 32132.)

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

M. SUZANNE MURPHY
General Counsel

By _____
Mary Weiss
Senior Regional Attorney

Attachment

cc: Brenda Sutton-Wills, Staff Counsel

MW

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
700 N. Central Ave., Suite 200
Glendale, CA 91203-3219
Telephone: (818) 551-2809
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December 22, 2011

Richard Hood

Re: *Richard Hood v. Fillmore Unified Teachers Association*
Unfair Practice Charge No. LA-CO-1499-E
WARNING LETTER

Dear Mr. Hood:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on November 9, 2011. Richard Hood (Hood or Charging Party) alleges that the Fillmore Unified Teachers Association (Association or Respondent) violated section 3543(a) of the Educational Employment Relations Act (EERA or Act)[1] by denying him an equal right to participate in a contract ratification vote. For the purpose of this Warning Letter, it is assumed that the charge also means to allege a violation of EERA section 3543.6, subdivision (b) by interfering with Charging Party's exercise of rights guaranteed by the Act.[2]

I. Facts as Alleged

Charging Party was employed by the Fillmore Unified School District (District), but has retired since the conduct alleged in the charge took place. The charge alleges that Charging Party was denied an equal right to participate in a contract ratification vote because at his school site, the Association required him to report to a central location during limited times on May 4 and 5, 2011, whereas at other sites, the Association brought the ballot box to members in their classroom, and urged them to vote, during "prep time" on these days. The charge further alleges that at one site, but not at Charging Party's site, the Association allowed members to vote also on "Friday, May 6th, and Monday, May 7th," 2011.[3]

[1] EERA is codified at Government Code section 3540 et seq. The text of the may be found at www.perb.ca.gov.

[2] The Board Agent may, upon review of an unfair practice charge, determine the grounds under which the charge should be analyzed. (*Los Banos Unified School District* (2007) PERB Decision No. 1935.)

[3] It is assumed that the reference to "Monday, May 7th" is in error and that reference to Monday, May 9, 2011, is intended.

The charge further alleges that "[a]s a result of this vote and subsequent contract, [Charging Party] was given two classes he had not previously taught, and was not afforded a request for transfer." The charge finally alleges that "this union ratified contract resulted in [the] District being able to save itself money by lowering its share of teacher's retirement by . . . publishing its salary schedule based on reduced school[] days (furlough days)."

As a remedy, the charge requests that the ratification vote "should be conducted over again" and that Association officers "should be required to sign affidavits that they conduct this revote in the manner specified by PERB and [Association] guidelines."

II. Discussion

A. Burden to State a Prima Facie Case

PERB Regulation 32615(a)(5)[4] requires, inter alia, that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." The charging party's burden includes alleging the "who, what, when, where and how" of an unfair practice. (*State of California (Department of Food and Agriculture)* (1994) PERB Decision No. 1071-S, citing *United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944.) Mere legal conclusions are not sufficient to state a prima facie case. (*Ibid.*; *Charter Oak Unified School District* (1991) PERB Decision No. 873.)

The charging party's burden also includes alleging facts showing that the unfair practice charge was timely filed; i.e., that the alleged unfair practice occurred no more than six months prior to the filing of the charge. (*Los Angeles Unified School District* (2007) PERB Decision No. 1929; *City of Santa Barbara* (2004) PERB Decision No. 1628-M.) PERB is prohibited from issuing a complaint with respect to any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge. (*Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board* (2005) 35 Cal.4th 1072.) The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (*Gavilan Joint Community College District* (1996) PERB Decision No. 1177.)

B. Failure to State a Timely Prima Facie Case

1. Untimeliness

When calculating the statute of limitations, the six month period "is to be computed by excluding the day the alleged misconduct took place and including the last day." (*Saddleback Valley Unified School District* (1985) PERB Decision No. 558; see also *Service Employees International Union, United Healthcare Workers West (Scholink)* (2011) PERB Decision No.

[4] PERB Regulations are codified at Code of Regulations, title 8, section 31001 et seq. The text of the PERB Regulations may be found at www.perb.ca.gov.

2172-M, holding that where the charging party complained of unlawful conduct occurring on September 8, 2009, the statute of limitations period began on September 9, 2009, and concluded on March 8, 2010, and dismissing the charge as untimely because the charging party did not file the unfair practice charge until March 9, 2010.)

The instant charge was filed on November 9, 2011. Accordingly, any allegations of unlawful conduct that occurred before May 9, 2011, are untimely. The allegations of improprieties that occurred on or before May 7, 2011—specifically, that the Association required Charging Party to report to a central location during limited times but brought the ballot box to other members in their classroom during "prep time"—must, therefore, be dismissed as untimely. Only the allegations of improprieties that occurred on or after May 9, 2011—specifically, that the Association allowed members at one site, but not Charging Party's site, to vote on May 9, 2011—are timely.

2. Interference

The test for whether a respondent—here, the Association—has interfered with the rights of employees under the EERA is the same for employers and employee organizations and does not require that unlawful motive be established, only that at least slight harm to employee rights results from the conduct. In *State of California (Department of Developmental Services)* (1983) PERB Decision No. 344-S, citing *Carlsbad Unified School District* (1979) PERB Decision No. 89 and *Service Employees International Union, Local 99 (Kimmett)* (1979) PERB Decision No. 106, the Board described the standard as follows:

> [I]n order to establish a prima facie case of unlawful interference, the charging party must establish that the respondent's conduct tends to or does result in some harm to employee rights granted under EERA.

(Emphasis supplied.)

Under the above-described test, a violation may only be found if EERA provides the claimed rights. By contrast, a violation of rights granted under, *e.g.*, the Association's constitution, bylaws, or other internal governing document does not, without more, state a violation.

In *Stationary Engineers Local 39 (May)* (2010) PERB Decision No. 2098-M (*May*), PERB found that it is well-established that it does not have jurisdiction over matters concerning internal union affairs unless they have a substantial impact on the relationship of bargaining unit employees to their employer so as to give rise to a duty of fair representation. PERB held that allegations of a union's failure to inform its members of a bargaining decision, provide them with information, or call a union membership meeting regarding that bargaining decision did not meet this test. (*Ibid.*) PERB so held despite the allegation that the bargaining decision at issue there "resulted in additional work assignments" to the charging party in that case, because "the dispute concern[ed] internal union operations and communications with union members, not the ultimate outcome of negotiations between [the union] and [the employer]."

(*Ibid.*) Similarly, in *California State Employees Association (Hutchinson)* (1999) PERB Decision No. 1369-S, the Board dismissed allegations that the union conducted elections outside the timeframe required by union bylaws, mailed election ballots, improperly validated ballots, failed to properly distribute election results, and improperly installed union officers in violation of union bylaws.

By the same token, PERB does not have jurisdiction over the allegation that the Association allowed members at one site, but not Charging Party's site, to vote on May 9, 2011, absent a showing that this conduct had a substantial impact on Charging Party's relationship to the District. Under *May*, the allegation that "[a]s a result of this vote and subsequent contract, [Charging Party] was given two classes he had not previously taught, and was not afforded a request for transfer," and that "this union ratified contract resulted in [the] District being able to save itself money by lowering its share of teacher's retirement by . . . publishing its salary schedule based on reduced school[] days (furlough days)," does not establish the required impact, because "the dispute [over the ratification vote] concerns internal union operations and communications with union members, not the ultimate outcome of negotiations between [the Association] and [the District]." (*May*, *supra*, PERB Decision No. 2098-M.)

3. Duty of Fair Representation[5]

A charge states a prima facie case of a violation of the duty of fair representation under the circumstances of the present case only if it appears from the charge that "either the agreement itself, or the determination not to seek formal ratification [or similar conduct, such as the decision to allow members at one site, but not Charging Party's site, to vote on May 9, 2011], was arbitrary, discriminatory[,] or in bad faith." (*California School Employees Association and its Chapter 107 (Marquez)* (1995) PERB Decision No. 1097.) The charge does not include facts from which it appears that the Association's decision to allow members at one site, but not Charging Party's site, to vote on May 9, 2011, was arbitrary, discriminatory, or in bad faith. Accordingly, an allegation of a violation of the duty of fair representation would have to be dismissed as well.

III. Conclusion

For these reasons the charge, as presently written, does not state a prima facie case.[6] If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies

[5] The charge does not allege that the Association violated EERA section 3544.9 by failing to fairly represent Charging Party. This section is included here in the event Charging Party intended or understood such an allegation to be included in the charge.

[6] In *Eastside Union School District* (1984) PERB Decision No. 466, the Board explained that a prima facie case is established where the Board agent is able to make "a determination that the facts as alleged in the charge state a legal cause of action and that the charging party is capable of providing admissible evidence in support of the allegations. Consequently, where the investigation results in receipt of conflicting allegations of fact or

explained above, Charging Party may amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by an authorized agent of Charging Party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the Respondent's representative and the original proof of service must be filed with PERB. If an amended charge or withdrawal is not filed on or before January 6, 2012,[7] PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Bernhard Rohrbacher
Supervising Regional Attorney

BR

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contrary theories of law, fair proceedings, if not due process, demand that a complaint be issued and the matter be sent to formal hearing." (*Ibid.*)

[7] A document is "filed" on the date the document is **actually received** by PERB, including if transmitted via facsimile. (PERB Regulation 32135.)